No. 84-95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *et al.,*
Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

HOWARD J. TRIENENS
ALFRED A. GREEN
JUDITH A. MAYNES
JOSEPH J. STRELKOFF
295 North Maple Avenue
Basking Ridge, N.J. 07920

MICHAEL BOUDIN*
J. MICHAEL HEMMER
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for American Telephone and Telegraph Company

September 19, 1984

*Counsel of Record

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RULE 28.1 LISTING

American Telephone and Telegraph Company, which has no parent company, retains a minority interest in two companies that have outstanding securities in the hands of the public[1]—Cincinnati Bell Inc. and The Southern New England Telephone Company.

[1] Counsel for AT&T understand Rule 28.1 to require disclosure of only those subsidiaries or affiliates with outstanding securities in the hands of the public.

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Pursuant to Rule 22.1 of the Rules of this Court, respondent American Telephone and Telegraph Company ("AT&T") opposes the petition for certiorari filed by National Association of Regulatory Utility Commissioners ("NARUC").[1]

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[1] The time for filing this opposition was extended by the Court from August 20, 1984, to and including September 19, 1984.

STATEMENT OF THE CASE

This case concerns the way in which the Federal Communications Commission has structured interstate rates to recover from end users and interexchange carriers the interstate costs incurred by local telephone companies in originating and terminating interstate calls. The FCC adopted this rate structure after many years of study; interstate rates reflecting the FCC order have gone into effect; and the Court of Appeals has unanimously affirmed the agency on the basic issues presented below. NARUC's certiorari petition seeks review limited to one of those issues—the FCC's authority to recover fixed costs of the interstate telephone system from end users through fixed monthly charges.

1. A caller making or receiving telephone calls uses the same local telephone company facilities regardless of whether the calls are interstate or intrastate calls. Such calls travel over the same "loop" between the caller's home and the local telephone company switch at the local exchange, and the same switch at the exchange routes all such calls onward toward their destination. Most of the costs of these dual-use facilities—facilities used interchangeably for interstate and intrastate calls—are "non-traffic sensitive" costs; they are fixed costs that remain the same regardless of the number, length, or type of calls made.

Because these local telephone company facilities provide both interstate and intrastate service, responsibility for regulating rates designed to recover the costs of these facilities is divided between the FCC and state authorities. Under a formula developed pursuant to Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), a portion of these local plant costs must be recovered through rates subject to the FCC's jurisdiction, and the balance through

rates subject to the jurisdiction of state authorities. Approximately 25% ($11 billion) of non-traffic sensitive local plant costs are assigned to the interstate jurisdiction for recovery through rates subject to the FCC's approval.

2. In this case, because of changes in the communications industry, the FCC fashioned a new approach for recovery of the portion of local telephone company plant costs assigned to its jurisdiction.[2] In the past, the non-traffic sensitive costs of a customer's line allocated to the interstate jurisdiction had been recovered on a per-call, usage sensitive basis; that is, a caller would pay for a portion of his line costs with every interstate call he made. Thus, an average-to-heavy user paid many times the cost of his local line while a light user paid little to none of the costs of his line allocated to the interstate jurisdiction. Under the FCC's new plan, the non-traffic sensitive customer line costs assigned to the FCC's jurisdiction will be recovered in part from telephone customers through flat monthly charges, thus ensuring that the interstate costs of a customer's line are borne by the actual cost causer.

Tariffs implementing the first phase of the FCC's new plan went into effect on May 25, 1984. A flat charge for multi-line business users is currently in effect at a rate of up to $6 per line. The remainder of the interstate non-traffic sensitive costs is now being paid by the long-distance carriers which in turn collect such amounts by charging their own customers. Residential and single-line business customers are scheduled to be assessed a flat rate starting in mid-1985. The initial amount of the rate has not yet been set finally, although the FCC has determined that it should not exceed $4 per line through 1990.[3]

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[2] The approach is set forth in a succession of FCC orders in 1983 and 1984 in the agency proceeding involved in this case. See Pet. App. 27a-32a. "Pet. App." refers to Appendix A to NARUC's petition.

[3] The FCC currently has underway proceedings to set these end user charges, providing such exemptions as may be needed to protect universal service.

3. On judicial review of the FCC's new plan, a number of parties mounted a variety of different challenges to the way in which the FCC had structured interstate rates in its new plan. Except in minor respects, the Court of Appeals rejected all of these challenges. The attack renewed here by NARUC does not challenge the reasonableness of the FCC's plan but rather the FCC's authority to direct the recovery of fixed interstate costs through fixed charges to be paid generally by telephone subscribers.[4]

NARUC claimed below and argues in this Court that the FCC-required fixed end user charge to recover the interstate costs in question conflicts with this Court's decision in *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), and invades ratemaking authority reserved to the states by Section 2(b) of the Communications Act, 47 U.S.C. § 152(b). The Court of Appeals unanimously rejected these claims after a thorough analysis of the pertinent case law and arguments. In substance, the lower court found that *Smith* delineated the boundaries of state regulatory jurisdiction and has nothing to do with the FCC's choice among alternative interstate rate structures; and it rejected NARUC's Section 2(b) argument because

[4] The concerns prompting the FCC to adopt this approach included its desire to assure universal telephone service, achieve efficient use of the network, and assign responsibility for costs to those who cause them. In particular, the FCC was concerned that continuing the existing system, which requires heavy users to subsidize light users (see p. 3, above), was driving heavy users to "bypass" the network, leaving light users to make up the difference. A summary of the FCC's reasons appears in the opinion below (see Pet. App. 27a-32a); but detailed discussion is unnecessary because NARUC has not challenged the rationality of the FCC's action in this Court.

The Connecticut *amicus* brief claims that the access charges will impair universal service; but the court below specifically sustained the FCC's finding that most end users could afford to pay at least a portion of the cost of their own lines (Pet. App. 51a) and held that the FCC "had record support for the view that a charge could be imposed without substantial negative effect on universal service." *Id.* at 52a. The FCC found that usage-based charges (which drive heavy users to bypass the local network) pose a far greater threat to universal service than a system of fixed end user charges.

the FCC was engaged solely in structuring interstate rates to recover interstate costs.

SUMMARY OF ARGUMENT

Certiorari is not warranted in this case. See Sup. Ct. Rule 17. No conflict exists between this Court's decision in *Smith* v. *Illinois Bell Telephone Company,* 282 U.S. 133 (1930), and the FCC's decision to use fixed end user charges to recover the fixed costs assigned to the interstate jurisdiction. *Smith* delimited state-agency jurisdiction; by contrast, the FCC's action is simply the exercise of federal-agency authority to decide the structure of interstate rates.

Because the FCC's decision structures interstate rates to recover interstate costs, no invasion of state authority over intrastate rates is even remotely involved. No decision of this or any other court supports NARUC's reading of Section 2(b), 47 U.S.C. § 152(b), whereas the lower court's analysis is consistent with prior decisions in four circuits, which this Court has declined requests to review. See p. 10, n.11, below.

ARGUMENT

I. There Is No Conflict Between the Decision Below and *Smith.*

NARUC claims that the decision below conflicts with *Smith,* but it plainly does not. The Court in *Smith* decided that a state regulatory authority has no jurisdiction to set rates to recover costs attributable to interstate service.[5]

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[5] At issue in *Smith* was the validity of rates prescribed by the Illinois Commerce Commission for service provided by the Illinois Bell Telephone Company in Chicago. The telephone company attacked the rates as confiscatory, claiming that the allowed intrastate rate of return on its Chicago property was unlawfully low. The District Court agreed, but this Court

(footnote continues)

The Court held in *Smith* that a state agency may prescribe rates only for intrastate telephone service and that ratemaking for interstate service is the province of federal regulatory authorities. See pp. 8-10, below. This principle is carried out through the statutory mechanism by which costs of jointly used plant are assigned to the federal and state jurisdictions,[6] and each jurisdiction then takes responsibility for setting the rates to recover the costs assigned to it.

In this case, NARUC attacks the FCC's decision to recover, through the use of fixed end user charges, a portion of the fixed costs assigned to the interstate jurisdiction. However, nothing in *Smith* purported to decide *how* federal authorities may allocate among telephone customers the responsibility for paying costs assigned to the federal jurisdiction for recovery through interstate rates. See Pet. App. 37a-38a. *Smith* did not decide *who* should pay the costs of interstate telephone service; it simply decided that responsibility for setting rates to recover such costs belongs to federal authorities rather than the states.

(footnote continued)

reversed because interstate property had been included in the computations. The Court held that the company's rate base for state ratemaking purposes could include only that portion of the company's Chicago property devoted to intrastate service, and not the company's entire Chicago property. Accordingly, the Court directed the District Court to determine on remand whether the company's rate of return on that portion of its Chicago property devoted to intrastate service was lawful. Setting rates for interstate service was the province of federal regulatory authorities, the Court held, and telephone company property devoted to interstate service should not be included with property devoted to intrastate service in defining a telephone company's rate base for state ratemaking purposes—nor, as a result, for purposes of determining the validity of the state rates.

[6] See the discussion of Section 410(c) at pp. 2-3, above. The FCC's decision in this case did not change the pre-existing assignment formula; it concerned itself solely with the structure of interstate rates to recover those costs assigned to the interstate jurisdiction.

NARUC claims that the FCC's plan indirectly undermines *Smith* because allegedly its effect is to impose interstate costs on "local ratepayers." NARUC is mistaken in its premise that there exist "local ratepayers" who do not cause interstate costs. Each "local" customer's line provides access to interstate as well as intrastate service, and a portion of the cost of each customer's line is accordingly assigned to be recovered through interstate rates. Because the cost is non-traffic sensitive, it exists regardless of whether or how much the customer uses his line for interstate calls. All that the FCC has done here is to establish a system providing for partial recovery of such fixed costs through fixed monthly interstate charges to be paid by each customer, rather than continuing a system under which almost all such interstate costs were recovered on a per-call basis thus requiring heavy users to pay many times the cost of their own line. See p. 3, above.

By establishing a structure of interstate rates to recover interstate costs, the FCC has exercised the very federal authority that this Court recognized in *Smith* as belonging to the federal agency. See 282 U.S. at 148-49. As the Court of Appeals observed, "*Smith* dealt with jurisdiction; it . . . did not address the manner in which the federal agency was to perform its task." Pet. App. 37a. The reading of *Smith* advanced by NARUC is not supported by the language of *Smith*, its rationale, or any subsequent decision interpreting *Smith* either in this Court or in any other Court of Appeals. There is no warrant for further review.

II. In Establishing Its System of End User Interstate Charges To Recover Interstate Costs, the FCC Clearly Did Not Invade Regulatory Authority Reserved to the States.

NARUC also claims that the FCC's plan invades a sphere of ratemaking authority reserved to the states by the Communications Act. It relies primarily upon Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), which restricts the FCC's jurisdiction over intrastate rates and services.[7] As the court below correctly held, neither Section 2(b), nor any other provision of the Act,[8] is infringed by the FCC's action.

In this case, the fixed end user charges adopted by the FCC are *interstate* rates limited to recovering costs assigned to the *interstate* jurisdiction. The FCC's rates do not recover costs assigned to the intrastate jurisdiction; those costs are recovered through rates established by state agencies, which are not at issue in this case. The FCC has exercised its own jurisdiction to set interstate rates and no infringement of state authority over intrastate rates is involved.

NARUC insists, however, that the FCC has *in effect* invaded state ratemaking jurisdiction by prescribing rates that function as a "precondition" of intrastate service. NARUC pet. 17. If subscribers must pay interstate rates

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[7] This limitation is itself subject, as the Courts of Appeals have held, to the FCC's overriding power to preempt state law to effectuate the purposes of the Act. See p. 10, n.11, below.

[8] NARUC also cites Section 221(b) of the Communications Act, 47 U.S.C. § 221(b), but it has no bearing on this case. Section 221(b) has been uniformly construed as limited to preserving state regulation of local exchanges that happen to overlap state lines. See, *e.g., Computer and Communications Industry Association* v. *FCC*, 693 F.2d 198, 216-17 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983). As the Court of Appeals concluded, "Section 221(b) is irrelevant" to the issue of the FCC's authority to prescribe the rates challenged by NARUC. Pet. App. 39a n.21.

in order to make intrastate calls, NARUC argues, then the interstate rates "amount to" additional intrastate charges (NARUC pet. 18), even though the rates are filed with the FCC as interstate rates and even though they recover interstate costs caused by the customer. NARUC's argument is mere rhetoric.

Interstate and intrastate service are interdependent not because of FCC regulation but because of technology. Because the same fixed customer line is used to originate and terminate local and long distance calls, and because a portion of the cost of that line is therefore allocated to the interstate jurisdiction and does not vary with the amount of use, the customer causes both interstate and intrastate costs when he or she subscribes to telephone service. The FCC's fixed end user charges simply recover from the customer a part of the *interstate* share of the costs of such dual-use facilities, and it cannot invade the state's jurisdiction for the FCC to insist that those interstate costs be paid by the customer.[9]

NARUC complains that interstate costs are being recovered from some customers who may make or receive no interstate calls in a given month. As the court below stated, this complaint might make sense "if a subscriber's choice not to make interstate calls meant that certain fixed 'interstate' costs would not be incurred." Pet. App. 42a. However, as the court below explained, "[a] subscriber's choice not to make or receive interstate calls . . . would not reduce the costs of that subscriber's loop; the local telephone plant costs would remain unchanged, as would the

[9] If NARUC's precondition argument had any substance, which it does not, it would as readily invalidate an entire body of state-regulated fixed charges for local monthly service that have been imposed for years in many jurisdictions. Paying those state-regulated charges could easily be described as a "precondition" of using the same home or business telephone for interstate service, a subject that Section 2(a) of the Act, 47 U.S.C. § 152(a), reserves to the FCC.

need to recover those costs." *Id.* at 43a. The court continued:

> "If we indulged NARUC's claim—that jurisdictional significance attends an individual subscriber's decision to use its line entirely for intrastate calls—then, as NARUC's counsel conceded, NARUC could hardly contest an allocation of all of such a subscriber's line costs (previously divided between the interstate and intrastate domains) to the intrastate jurisdiction alone. . . . It is hard to see what significant benefit NARUC would gain under such an arrangement." *Id.* (footnote omitted).[10]

NARUC does not claim that any decision of this Court or any other Court of Appeals supports its reading of Section 2(b). On the contrary, its petition (pp. 18-20) seeks to *distinguish* a consistent line of Court of Appeals decisions, representing the views of four circuits,[11] that the FCC *can* preempt state regulation where necessary to achieve federal ends. In this case the FCC's end user charges do not regulate intrastate rates or service, and no assertion of preemptive power is necessary to support the

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[10] To the extent that NARUC disagrees with the FCC's view that a customer imposes interstate costs by subscribing to telephone service (see Pet. 18 n.20), NARUC is arguing its theory of cost-causation in the wrong forum. The FCC concluded after five years of deliberation that sound policy required attributing to each subscriber the fixed cost of his connection to the network so far as that cost has been allocated to the interstate jurisdiction. The Court of Appeals accepted the FCC's judgment as rationally supported (see Pet. App. 42a) and this issue is hardly one meriting Supreme Court review.

[11] NARUC pet. 18 cites *North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976), *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977), and *Computer and Communications Industry Association* v. *FCC*, *supra*. In addition, in cases not cited by NARUC, the First and Second Circuits have taken the same view. See *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *New York Tel. Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980).

FCC's action here. The cases NARUC attacks merely illustrate how far *beyond* the FCC's action in the present case the agency may legitimately go to implement the policies of the Communications Act.

CONCLUSION

The decision of the Court of Appeals does not merit review under this Court's standards. See Sup. Ct. Rule 17. It is not in conflict with *Smith* or any other decision of this Court or any other Court of Appeals; and it does not involve any invasion of ratemaking authority reserved by the Communications Act to the states. For the foregoing reasons, the petition should be denied.

Respectfully submitted,

HOWARD J. TRIENENS
ALFRED A. GREEN
JUDITH A. MAYNES
JOSEPH J. STRELKOFF
295 North Maple Avenue
Basking Ridge, N.J. 07920

MICHAEL BOUDIN*
J. MICHAEL HEMMER
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for American Telephone and Telegraph Company

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*Counsel of Record